No. 98-736

(2)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

IRMGARD LIPCON, MITCHELL LIPCON, CHARLES R. LIPCON, and BARBARA LIPCON,

Petitioners,

—v.—

UNDERWRITERS AT LLOYD'S LONDON a/k/a THE CORPORATION OF LLOYD'S a/k/a SOCIETY OF LLOYD'S; a/k/a LLOYD'S OF LONDON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT LLOYD'S IN OPPOSITION

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PARTIES TO THE PROCEEDING

Respondent the Corporation of Lloyd's ("Lloyd's"), incorrectly sued herein as Underwriters at Lloyd's London a/k/a the Corporation of Lloyd's a/k/a Society of Lloyd's; a/k/a Lloyd's of London, is not a publicly held corporation, has no parent corporation, and has no subsidiaries that are not wholly owned.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Lloyd's respectfully submits this opposition to the petition for a writ of certiorari (the "Petition," cited herein as "Pet.") seeking review of a judgment of the United States Court of Appeals for the Eleventh Circuit that requires Petitioners to adjudicate their claims against Lloyd's in the courts of England, pursuant to English law, as they contractually committed to do.

STATEMENT OF THE CASE

No fewer than eight of the United States courts of appeals have considered the primary question presented here — whether the mere assertion of claims under the federal and/or state securities laws by individual underwriting members of Lloyd's ("Names") permits those Names to avoid their contractual agreement to litigate all disputes relating to their membership of, or underwriting at, Lloyd's in the courts of England, pursuant to English law (the "Choice Clause"). All eight courts of appeals have held the Names to their agreements.[1] This Petition

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[1] Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1300 (11th Cir. 1998) (cited herein as Petitioners' Appendix ("Pet. App.") A-1 et seq.), petition for cert. filed, 67 U.S.L.W 3337 (U.S. Nov. 2 1998) (No. 98-736); Stamm v. Barclays Bank, 153 F.3d 30 (2d Cir. 1998) (per curium); Richards v. Lloyd's of London, 135 F.3d 1289 (9th Cir.) (en banc) ("Richards II"), withdrawing Richards v. Lloyd's of London, 107 F.3d 1422 (9th Cir. 1997) ("Richards I"), cert. denied, ___ U.S. ___, 119 S. Ct. 365 (1998); Haynsworth v. Corporation of Lloyd's, 121 F.3d 956 (5th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1513 (1998); Allen v. Lloyd's of London, 94 F.3d 923 (4th Cir. 1996), mandamus denied, ___ U.S. ___, 117 S. Ct. 2497 (1997); Shell v. R.W. Sturge Ltd., 55 F.3d 1227 (6th Cir. 1995); Bonny v. Society of Lloyd's, 3 F.3d 156 (7th Cir. 1993), cert. denied, 510 U.S. 1113 (1994); Roby v. Corporation of Lloyd's, 996 F.2d 1353 (2d Cir.), cert. denied,

Footnote continued

represents the seventh attempt by Names to seek review by this Court of this question. In each of the six prior cases in which Names have sought review by this Court, it has been denied — most recently, in April and October of this calendar year.[2]

Petitioners here have presented this Court with no reason whatever to grant review in this case. To the contrary, the procedural history of this case graphically illustrates the sort of "artful pleading" that the courts of appeals have consistently recognized would result from adoption of the Names' arguments. See, e.g., Haynsworth, 121 F.3d at 969; Roby, 996 F.2d at 1360.

Petitioners Irmgard Lipcon and Mitchell Lipcon (sometimes collectively referred to herein as the "Name Petitioners") underwrote insurance as Names in the English insurance market regulated by Respondent Lloyd's pursuant to Acts of the British Parliament. Petitioners Charles Lipcon and Barbara Lipcon (sometimes collectively referred to herein as the "Spouse Petitioners") have never been Names; they are married to Irmgard Lipcon and Mitchell Lipcon, respectively, and allege claims against Lloyd's that the lower courts found to be "completely derivative" of the claims of their Name spouses. Pet. App. A-31, A-42-44.

Petitioners initially sued Lloyd's in a Florida state court and asserted claims against Lloyd's arising solely under state law,

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Footnote continued from previous page

510 U.S. 945 (1993); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953 (10th Cir.), cert. denied, 506 U.S. 1021 (1992).

[2] See cases cited supra at note 1. This Court declined to review virtually identical petitions for writs of certiorari in Haynsworth, No. 97-1283, and Richards II, No. 97-1779, on April 20, 1998 and October 13, 1998, respectively.

in the apparent hope of avoiding the many federal precedents holding the Choice Clause enforceable. Even after removal of the case to federal court, Petitioners did not assert claims under the federal securities laws. Following the district court's dismissal of their state law claims pursuant to the Choice Clause, Petitioners amended their complaint — more than a year after it was first filed — to plead causes of action under the federal securities laws. Petitioners then argued that the "anti-waiver" provisions of the federal securities statutes, 15 U.S.C. §§ 77n, 78cc(a), automatically void the Choice Clause, permitting them to pursue federal claims against Lloyd's based on the very same factual allegations upon which their dismissed state law claims had been based. The district court rejected this argument and dismissed the action again.

In affirming the district court's decision enforcing the Choice Clause, the Eleventh Circuit followed the decisions of all seven of the other courts of appeals to rule on the enforceability of the Choice Clause.[3] The unanimity of the circuits on this issue is based on controlling precedent of this Court in M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), and Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974). In Bremen, this Court held that forum selection and choice of law agreements made in the context of international commercial agreements are presumptively valid. In Scherk, this Court, following Bremen, explicitly rejected the assertion that the anti-waiver provisions of the federal securities laws voided an international forum selection agreement simply because the plaintiff had asserted a claim under the Exchange Act — the precise argument made here by Petitioners.

Scherk controls this case. Petitioners have provided no compelling reason for this Court to reexamine Scherk, and complete unanimity as to the question presented exists among the lower federal courts. Petitioners have thus failed to state any

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[3] See supra note 1.

basis to invoke this Court's discretionary jurisdiction to grant a writ of certiorari.

The Name Petitioners have also attempted to circumvent the Choice Clause by another route: by adding their spouses (the Spouse Petitioners) to the caption, on the theory that, because the Spouse Petitioners did not sign the General Undertaking, they are free to pursue the very same claims that the Name Petitioners are barred by the Choice Clause from pursuing. The district court and the Eleventh Circuit correctly held — and Petitioners have not disputed in their Petition to this Court — that the Spouse Petitioners' claims against Lloyd's were "completely derivative" of the claims of the Name Petitioners. Pet. App. 31. The lower courts therefore refused to permit the Petitioners to evade the Choice Clause by this transparent tactical ploy.

Petitioners nonetheless assert that the lower courts' dismissal of the Spouse Petitioners' claims is inconsistent with this Court's decision in First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995), thus attempting to create a basis for further review by this Court. There is no inconsistency, however, between the lower courts' rulings and First Options, which is inapposite both on the facts and the law. This Court did not hold in First Options — nor has it ever held — that a non-signatory plaintiff may never be bound to a forum selection clause when the non-signatory in question is closely related to a signatory of the agreement. Petitioners provide no rationale for the Court to consider adopting such a rigid rule, which would only encourage the sort of manipulative pleading found in this case.

Factual Background

Respondent Lloyd's is an English entity that has been given authority by the British Parliament to regulate a major international insurance market that operates in London, England. Pet. App. A-2. Lloyd's exercises these powers in accordance with various British statutes, including the Lloyd's Act 1982. Id. Lloyd's is also subject to direct regulation by Her Majesty's Treasury (which assumed the prior regulatory responsibilities of the British Department of Trade and Industry in January of this year).

Lloyd's itself does not accept premiums or insure risks. Pet. App. A-2. Rather, individual Names such as the Name Petitioners act as the insurers in the Lloyd's market. Names come from over seventy different countries around the world. Names underwrite insurance policies through various syndicates, but within each syndicate, each Name underwrites for his own account and at his own risk. See Respondent's Appendix (cited herein as "Resp. App.") at R8-9. Names' liability on the insurance risks they have underwritten is several, not joint, and no Name is responsible for the unfulfilled obligations of any other Name. The underwriting affairs of each syndicate are handled by a Managing Agent pursuant to delegated authority from the Names participating in the syndicate, and Names are also assisted in their underwriting businesses by Members' Agents, who, among other things, advise Names as to which syndicates to participate in. Pet. App. A-2-3.

No one is permitted to become a Name without personally travelling to England for an interview in which, among other things, the prospective Name acknowledges the risks associated with underwriting insurance in the Lloyd's market. Pet. App. A-3. Names are also required, as a condition of initial and/or continuing membership and the right to underwrite in the Lloyd's market, to execute various standard form agreements, including the General Undertaking. (Copies of the General Undertakings executed by Petitioners Irmgard and Mitchell

Lipcon are included in Respondent's Appendix at Resp. App. R1-6).

The version of the General Undertaking required since 1986 is a simple two-page agreement, which each of the Name Petitioners acknowledges signing. Pet. 11. By executing the General Undertaking, the Petitioner Names expressly agreed to comply with all English statutory requirements related to their underwriting in the Lloyd's market, and with all regulations promulgated by the Council of Lloyd's pursuant to the legislative and regulatory authority granted to it by Parliament. Resp. App. R2, ¶ 1.

The General Undertaking also includes (in paragraphs 2.1 and 2.2) the Choice Clause, which reads in its entirety:

> The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.
>
> Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and that accordingly any suit, action or proceeding (together in this Clause 2 referred to as "Proceedings") arising out of or relating to such matters shall be brought in such courts and, to this end, each party hereto irrevocably agrees to submit to the jurisdiction of the courts of England and irrevocably waives any objection which it may have now or hereafter to (a) any Proceedings being brought in any such court as is

> referred to in this Clause 2 and (b) any claim that any such Proceedings have been brought in an inconvenient forum and further irrevocably agrees that a judgment in any Proceedings brought in the English courts shall be conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction.

Resp. App. R2-3.

Procedural History

District Court Proceedings. Petitioners commenced this action in state court in Dade County, Florida, on March 22, 1996, and amended their complaint on March 28, 1996. The initial and first amended complaints alleged causes of action under the securities statutes of the State of Florida, but did not allege any causes of action under the federal securities statutes. Lloyd's then removed the action to the United States District Court for the Southern District of Florida. Lloyd's then moved to dismiss the action under Fed. R. Civ. P. 12(b)(3) on the grounds that, among other things, the Choice Clause required Petitioners to litigate any claims against Lloyd's exclusively in the courts of England.[4]

In opposing dismissal, Petitioners alleged that the Choice Clause was unenforceable because it had been induced by fraud and because enforcement of the Choice Clause was contrary to the public policy of Florida. While the state securities statutes of certain states contain provisions analogous to the anti-waiver provisions of the federal securities laws (see, e.g., Cal. Corp.

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[4] Lloyd's also sought dismissal in the alternative for forum non conveniens. Neither the district court nor the Eleventh Circuit found it necessary to reach this issue in light of their holdings that the Choice Clause was enforceable and required dismissal.

Code §25701 (West 1997)), the Florida securities statutes invoked by the Petitioners contain no such provisions. Nonetheless, Petitioners did not seek to amend their complaint to add claims under the federal securities laws. The Petitioners also argued that the Spouse Petitioners could not be bound by the Choice Clause because they had never personally signed the General Undertaking containing it. On October 3, 1996, the Petitioners moved for conditional leave to file an amended complaint providing more factual details of the alleged fraud in the inducement, in the event the court were to determine that they had not adequately pleaded fraud in the inducement. The Petitioners did not at that time seek leave to add federal securities claims or any other federal statutory claims.

On February 28, 1997, the district court granted Lloyd's motion, held the Choice Clause enforceable, and dismissed the action. The district court's opinion rejected the Petitioners' fraud-in-the-inducement and public policy arguments, as well as the claim that the Choice Clause was not applicable to the Spouse Petitioners. The district court's opinion makes no mention of the anti-waiver provisions of the federal securities statutes or any other statute, as the Petitioners had not made any argument against dismissal based on such provisions.

On March 6, 1997, a divided panel of the Ninth Circuit issued its opinion in Richards I, 107 F.3d 1422 (9th Cir. 1997). The Ninth Circuit panel majority declined to follow the decisions of the five federal appellate courts that as of that time had enforced the Choice Clause, and held that Names could litigate federal statutory securities claims, and possibly federal claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq., in the United States courts because of the anti-waiver provisions of the federal securities laws. Id. at 1430-31. The Ninth Circuit panel majority also held, however, that the Choice Clause was enforceable to the extent it required dismissal of state statutory securities claims and common law claims. Id.

The very next day, March 7, 1997, Petitioners sought to capitalize on Richards I by filing motions to alter or amend the order of dismissal, and for rehearing with the district court. They accompanied these motions with a "proposed second amended complaint which includes Federal Security [sic] claims" and noted their intent "to request permission to amend to add a RICO claim also." See R. 4-76 at 1 (the volume and district court docket number, respectively, of entries in the district court record are cited herein as "R. ___-___"). On March 28, 1997, the district court denied Petitioners' motions, and stated that it was "unpersuaded by the conclusions reached" by the Richards I panel majority opinion. R. 5-82 at 3. Nonetheless, it treated Petitioners' papers as a motion for leave to amend the complaint, and granted such leave to "ensure that, for purposes of appeal, Plaintiffs have the opportunity to amend their complaint to include counts that may not have been included in the original complaint." Id.

Petitioners subsequently filed a second amended complaint, which asserted, for the first time, claims under (1) the Securities Act of 1933, 15 U.S.C. § 77a et seq.; (2) the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq.; and (3) RICO. Petitioners' misleading and abbreviated history of this litigation (Pet. App. 13) conspicuously fails to disclose that the action was more than a year old when Petitioners first asserted these federal claims.

On May 7, 1997, Lloyd's moved to dismiss the second amended complaint. On May 9, 1997, the court granted Lloyd's motion to dismiss "for the reasons stated in the Memorandum Opinion dated February 28, 1997." R. 7-88 at 2-3. For the second time, the court held that "all of [Petitioners'] claims are subject to the [Choice Clause, which] require[s] litigation in England." Id. at 3.

Eleventh Circuit. Petitioners timely appealed to the Eleventh Circuit. While the Eleventh Circuit appeal was being briefed, the Ninth Circuit granted rehearing en banc in the

Richards case and, on February 3, 1998, issued its en banc opinion, Richards II, which withdrew the Richards I opinion and held that the Choice Clause was enforceable in all respects, and required dismissal of all claims asserted by the Richards plaintiffs against Lloyd's, including federal securities and RICO claims.

The Securities and Exchange Commission ("SEC") filed a brief in the Eleventh Circuit as amicus curiae, arguing that the anti-waiver provisions of the federal securities statutes barred enforcement of the Choice Clause.[5] The Government of the United Kingdom of Great Britain and Northern Ireland filed a brief as amicus curiae supporting enforceability of the Choice Clause, and explaining why the Choice Clause was essential to the orderly operation of the international insurance market for whose regulation Lloyd's had responsibility pursuant to various Acts of Parliament. See Resp. App. R7-11. The SEC participated in oral argument before the Eleventh Circuit. (The SEC had also participated in oral arguments in Haynsworth and Richards II, in both of which instances the courts of appeals rejected its position on its merits). On August 5, 1998, the Eleventh Circuit unanimously ruled in favor of Lloyd's and affirmed the district court's dismissal, holding the Choice Clause enforceable as to all the Petitioners, including the Spouse Petitioners. Pet. App. A-31-A32.

REASONS FOR DENYING THE PETITION

All eight courts of appeals that have considered the enforceability of the Choice Clause have upheld it. They have done so by correctly applying the controlling decisions of this Court in Bremen and Scherk, which affirm the presumptive

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[5] The SEC took no position as to whether the Name Petitioners had actually purchased "securities" from Lloyd's within the meaning of the federal securities statutes, or whether Lloyd's had violated those laws. Pet. App. A-52 n.3.

validity of choice of forum and choice of law clause in contracts governing international transactions. Petitioners have shown no basis whatever for the extraordinary relief of a writ of certiorari as to this well-settled question, particularly when this Court has declined such review as to the exact same issue in six prior petitions for review — two of them in this calendar year.

Nor have Petitioners demonstrated any compelling reason to review the Eleventh Circuit's application of the Choice Clause to dismiss the Spouse Petitioners' claims. There is no conflict between the Eleventh Circuit's decision and the decision of any other court of appeals, or this Court's prior rulings.

I. THE ELEVENTH CIRCUIT PROPERLY HELD THAT THE CHOICE CLAUSE COULD NOT BE AVOIDED BY THE MERE ALLEGATION OF A CLAIM UNDER THE FEDERAL SECURITIES STATUTES

As petitioners now concede (Pet. App. 18), international forum selection and choice of law clauses such as the Choice Clause are "presumptively valid" "unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." Bremen, 407 U.S. at 10.[6] Before this Court, the Petitioners rely exclusively on the fourth ground set out in Bremen for rebutting the presumption of validity: that enforcement of the Choice Clause contravenes a strong public policy of the forum because it violates the anti-waiver provisions

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[6] Petitioners have apparently abandoned the argument they made before the Eleventh Circuit (Pet. App. A-13-14) that the Bremen test was not applicable to this case.

of the federal securities law. Pet. 18.[7] The Eleventh Circuit correctly rejected that argument. Pet. App. A-11-22.

A. Scherk Rejected Petitioners' Argument That The Anti-Waiver Provisions Bar Enforcement Of The Choice Clause

The Eleventh Circuit's rejection of the argument that the anti-waiver provisions of the federal securities laws render the Choice Clause unenforceable was mandated by this Court's ruling in Scherk. See Richards II, 135 F.3d at 1294 ("We . . . enforce the choice clause[] . . . . because we apply Scherk."); Haynsworth, 121 F.3d at 969 (Scherk is "directly on point"). The Scherk plaintiff, like Petitioners here, claimed that because the complaint alleged a cause of action under Section 10(b) of the Exchange Act, the anti-waiver provisions of the federal securities laws automatically voided the parties' voluntary commitment to have their dispute resolved in a foreign forum (an International Chamber of Commerce arbitral panel in Paris). This Court squarely rejected that argument and enforced the forum selection agreement.

1. The Enforceability Of A Contractual Choice Of Foreign Law Was Not "Left Open" In Scherk

Petitioners make two attacks on the binding authority of Scherk. First, they argue that Scherk "left open" the question of whether a forum selection clause that also chooses the law of another country is rendered unenforceable as a "waiver" of

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[7] In the district court and before the Eleventh Circuit, Petitioners unsuccessfully argued that the Choice Clause was unenforceable because it was procured by fraud. Pet. App. A-22-25; A-37-40. The Petitioners do not seek review by this Court of the lower courts' rulings on that issue.

statutory rights. Pet. 14-15. This argument is based on a complete misreading of Scherk: namely, that because the forum agreement did not include a contractual choice of foreign law, this Court assumed that the application of the federal securities laws to the parties' dispute was assured. Pet. 15.

While the parties in Scherk chose "'the laws of the State of Illinois'" to govern their disputes, 417 U.S. at 516, this Court in Scherk did not assume that the arbitral panel in Paris would apply the Exchange Act — as opposed to the common law of Illinois — to the plaintiff's claims. To the contrary, the Court noted that "this case . . . provides no basis for a judgment that only United States laws and United States courts should determine this controversy in the face of a solemn agreement between the parties that such controversies be resolved elsewhere." 417 U.S. at 517 n.11; see also id. at 516 ("considerable uncertainty existed at the time of the agreement, and still exists, concerning the law applicable to the resolution of disputes arising out of the contract") (emphasis supplied). The dissent also pointedly noted that application of the Exchange Act to the plaintiff's claims was not assured. Id. at 532 n.11 (Douglas, J., dissenting) ("[e]ven if the arbitration court should read this clause to require application of Rule 10b-5's standards, [the plaintiff's] victory would be Pyrrhic.").

In Bremen, this Court recognized that the parties' contractual choice of forum is often tantamount to a choice of law as well. Bremen, 407 U.S. at 13 n.15 (noting that it was "reasonable to conclude that the forum clause was also an effort to obtain certainty as to the applicable substantive law"). In Bremen, both the parties and the Court understood that the chosen English forum would likely apply English law, and that the relevant English law differed from American law in a way that would probably be outcome-determinative. Id. at 8 n.8. Although the Fifth Circuit had believed that the differences between English and American law rendered enforcement of the forum clause contrary to U.S. public policy, this Court held the plaintiff to its pre-dispute agreement to litigate in England, noting

that the public policies considered by the Fifth Circuit were not controlling in an international commercial agreement. Id. at 15-16.

Petitioners' argument reduces to the absurd proposition that the selection of a foreign forum, standing alone, will be honored even if the foreign forum is likely to apply its own law, while the selection of the same foreign forum, coupled with an express agreement that the foreign forum will apply its own law, is void as against public policy. That is simply not the law. As this Court emphasized in Scherk:

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

417 U.S. at 516. Scherk does not require parties to international transactions seeking "orderliness and predictability" to refrain from expressly choosing foreign law in order to assure that their choice of a foreign forum will be honored.

The need for "orderliness and predictability" is even greater in this case, because the General Undertaking is more than an ordinary international commercial agreement. By signing the General Undertaking, the Name Petitioners subjected themselves to Lloyd's regulatory authority, and agreed to comply with all applicable English statutes in the conduct of their underwriting business. They did so as a condition of being permitted to underwrite in an English insurance market operating under English law. Petitioners' claims against Lloyd's "aim[] at the heart of the unique self-regulatory mechanism within Lloyd's, which is a product of complex English legislation." Haynsworth, 121 F.3d at 960 (internal quotation and citation omitted). The Choice Clause is therefore critical to Lloyd's ability to regulate effectively a marketplace with participants from all over the

world, by ensuring that all disputes internal to the market will be predictably and consistently resolved under a single set of governing rules. As the Court of Appeal of the United Kingdom has held:

> The clear and simple purpose of this agreement, aptly called an undertaking, was to ensure that on his becoming a Name [defendant] became subject to the regulatory regime of Lloyd's. The clauses governing choice of law and venue were ancillary to that object.

Society of Lloyd's v. Clementson, [1995] LRLR 307 (C.A. Nov. 10, 1994) (LEXIS, Enggen Library, Cases File); see also Resp. App. R7-10 (Submission Of British Government To Eleventh Circuit herein).

2. Scherk Is Not Limited By Cases Involving Purely Domestic Transactions To Which The Securities Laws Indisputably Apply

Petitioners also argue that the Eleventh Circuit's reading of Scherk, and the rulings of seven other courts of appeals, are "contrary to those decisions that interpret the anti-waiver provisions in a domestic context." Pet. 21-22. In blithely asserting that "there is no basis for distinguishing between domestic and international transactions" (id.), Petitioners completely ignore the holding in Scherk itself, which rejected the dissenters' position that "No exception [to the anti-waiver provisions] is made for contracts which have an international character." 417 U.S. at 524 (Douglas, J., dissenting).

Indeed, this Court's decision in Scherk turned on the distinction between domestic and international transactions. The Court enforced the forum selection clause at issue even though, under the then-controlling precedent of Wilko v. Swan, 346 U.S. 427 (1953), an analogous arbitration agreement in a purely

domestic agreement would have been deemed unenforceable as violative of the anti-waiver provisions. As the Court observed:

> In Wilko . . . there was no question but that the laws of the United States generally, and the federal securities laws in particular, would govern disputes arising out of the stock-purchase agreement. . . . In this case, by contrast . . . considerable uncertainty existed at the time of the agreement, and still exists, concerning the law applicable to the resolution of disputes arising out of the contract.
>
> Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

417 U.S. at 515-516. Because of the inherent uncertainty concerning the applicable law in international transactions, this Court held that the reasoning underlying its holding in Wilko was "simply inapposite." Id. at 517.

Because Petitioners refuse to acknowledge that Scherk turned on the distinction between international and domestic transactions, they erroneously rely on post-Scherk decisions limiting, and then overruling, Wilko to permit arbitration of domestic securities disputes. See Pet. 16-17 (citing Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989), and Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987)). As the Eleventh Circuit correctly recognized (Pet. App. A-18), Rodriguez and McMahon are inapposite because they:

> involved the enforceability of an arbitration clause in a domestic securities agreement. Although the appellants contend that McMahon makes clear the Court's categorical unwillingness to permit waiver of the substantive remedies of the securities laws, we do not think that McMahon controls the case before us. As stated above, the Court consistently has treated "truly international agreements," Scherk, 417 U.S. at 515, 94 S. Ct. at 2455, differently than domestic transactions, which indisputably are subject to the anti-waiver provisions of the securities laws, see McMahon, 482 U.S. at 230, 107 S. Ct. at 2339.

Simply put, because Rodriguez and McMahon — like Wilko — involved purely domestic transactions as to which there was no dispute that the federal securities laws governed the plaintiffs' claims, they cannot be read to undercut Scherk.

B. Scherk Has Not Been Limited By Decisions Involving Claims Under Statutes Other Than The Federal Securities Laws

Petitioners also argue that enforcement of the Choice Clause is barred by post-Scherk decisions of this Court in cases involving international forum agreements when the plaintiffs asserted claims under statutes other than the federal securities laws. Pet. 23-26. These arguments are meritless. The Court's commitment to the enforcement of international forum selection agreements first demonstrated in Bremen and Scherk has not subsequently been limited or qualified. Quite to the contrary, in every subsequent case involving an international forum agreement, the Court enforced the agreement and overruled prior case law to the contrary.

Petitioners rely heavily on dictum contained in a footnote in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985), to support their argument that the Choice Clause is unenforceable. In Mitsubishi, this Court enforced an international arbitration clause in a case involving antitrust counterclaims, overruling a long line of lower court decisions holding antitrust claims to be non-arbitrable. Id. at 640. As the Court had done in Scherk with respect to the securities laws, the Court in Mitsubishi recognized that different policies and considerations applied in the international context. The Eleventh Circuit correctly found (Pet. App. A-16-18) that Mitsubishi is fully consistent with Scherk:

> [T]he Court in Mitsubishi recognized and affirmed Scherk's policy of treating international commercial agreements as sui generis.

Virtually all of the other courts of appeals that have enforced the Choice Clause have expressly considered, and expressly rejected, arguments based on the Mitsubishi footnote. See Richards II, 135 F.3d at 1295-96; Haynsworth, 121 F.3d at 968; Shell, 55 F.3d at 1230-31; Bonny, 3 F.3d at 160; Roby, 996 F.2d at 1364-65; Riley, 969 F.2d at 959-60. This Court has consistently declined to review those holdings.

Similarly, Petitioners can point to no support in Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995), for their contention that the federal courts must refuse to enforce forum agreements alleged to have the effect of violating a statutory provision. Pet. 23-25. In Vimar, this Court overruled a long line of lower court precedents that had voided forum agreements under the Carriage of Goods by Sea Act ("COGSA"), enforced forum selection and choice of law provisions requiring arbitration in Japan, and upheld the validity of the forum agreement at issue. COGSA is the implementation of an international treaty specifically intended to eliminate uncertainty regarding the law applicable to disputes arising from international bills of lading by creating uniform rights and obligations amongst

the signatory nations. Vimar therefore neither displaces nor modifies Bremen and Scherk, which recognize the needs of parties to international transactions to eliminate in advance any uncertainty as to the applicable law. See Richards II, 135 F.3d at 1296 n.5 ("Vimar, however, does not extend to the instant case as Vimar involved COGSA, a statute designed to address international transactions."); Haynsworth, 121 F.3d at 968-69 ("COGSA . . . [embodies] an international scheme the very nature of which would be frustrated by permitting parties to opt out of it.").

Petitioners do not dispute before this Court the findings of the Eleventh Circuit that Petitioners have varied and sufficient remedies available to them under English law in the English courts to redress any injury to them caused by Lloyd's. Pet. App. A-25-27. Petitioners instead argue that Mitsubishi and Vimar somehow confirm that the federal anti-waiver provisions impose an absolute requirement that a foreign forum afford them precisely the same rights and remedies allegedly available to them under the federal securities laws. Pet. 25 ("This does not mean waiver is acceptable if the defendant gives alternative remedies. [The anti-waiver provision] invalidates any waiver.") (emphasis in original).

Neither the anti-waiver provisions, nor any other public policy of this country, requires that parties to international commercial agreements be permitted to avoid their contractual choice of a foreign forum or foreign law by the simple expedient of adding a federal securities claim to their complaint. Petitioners' arguments merely reflect the "parochial concept that all disputes must be resolved under our laws and in our courts," a proposition this Court decisively rejected in Bremen, 407 U.S. at 9, and again in Scherk. 417 U.S. at 519. The Court correctly understood then, over twenty-five years ago, that: "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." Id. The increasing interdependence of our national economy with that of other nations over the last

quarter century makes that wise renunciation of parochialism even more important today than it was then.

C. Adoption Of Petitioners' Argument Would Encourage And Reward "Artful Pleading"

Petitioners' attempted reliance on the anti-waiver provisions of the federal securities laws to evade their contractual undertaking to litigate in England is particularly troubling given their belated and opportunistic assertion of those claims only after the Ninth Circuit's short-lived ruling in Richards I. But Petitioners' opportunism merely illustrates a fundamental problem inherent in the argument they espouse: that the mere assertion of federal securities claims, regardless of the underlying merits of those claims, should automatically bar enforcement of an otherwise-valid forum selection agreement. The adoption of such a principle would create endless potential for abuse and manipulation of our legal system.

As the Second Circuit noted in Roby:

> It defies reason to suggest that a plaintiff may circumvent forum selection . . . clauses merely by stating claims under laws not recognized by the forum selected in the agreement. A plaintiff would simply have to allege violations of his country's tort law or his country's statutory law or his country's property law in order to render nugatory any forum selection clause that implicitly or explicitly required the application of the law of another jurisdiction. We refuse to allow a party's solemn promise to be defeated by artful pleading.

996 F.2d at 1360 (emphasis in original). The Fifth and Seventh Circuits have likewise condemned such "artful pleading." Haynsworth, 121 F.3d at 969 ("We wholeheartedly adopt the Second Circuit's [above-cited] response."); Bonny, 3 F.3d at 162.

Petitioners' willingness to repackage their pleadings after the decision in Richards I dramatically illustrates precisely the sort of "artful pleading" decried by the decisions in Roby, Haynsworth, and Bonny. Petitioners' initial strategic decision to sue Lloyd's only under the law of Florida belies any subsequent claim that their rights may only be vindicated under the federal securities statutes.

The adoption of the arguments advanced in the Petition would not only reward manipulative and cynical pleading strategies such as those demonstrated by Petitioners, it would place on foreign defendants the burden to litigate the question of whether a "security" was offered or sold within the meaning of U.S. law before they could seek enforcement of a forum agreement — defeating the very purpose of such agreements, which is to confine litigation on merits issues to the chosen forum. This Court declined to place such a burden on the defendant in Scherk, even though, in that case, the Seventh Circuit had affirmed the denial of defendant's motion to dismiss for failure to state a claim under the Exchange Act. See Alberto-Culver Co. v. Scherk, 484 F.2d 611, 615 (7th Cir. 1973) rev'd, 417 U.S. 506 (1974). Leaving that decision undisturbed, the Court nonetheless declined to "reach, or imply any opinion as to, the question of whether the acquisition of Scherk's business was a security transaction." Scherk, 417 U.S. at 514 n.8.

Adoption of Petitioners' argument would require the federal courts, contrary to Scherk, to reach the issue of whether securities had been sold within the meaning of the federal securities laws, or to assume the truth of Petitioners' allegations to that effect, before deciding whether to enforce the Choice Clause.[8] Lloyd's vigorously denies that any aspect of the

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[8] It would obviously invite abuse for the "factual" basis of a party's attempt to overcome the Bremen presumption of enforceability to rest on no more than the bare and unverified allegations of a complaint. For this reason, among others, the

Footnote continued

Petitioners' conduct of an insurance underwriting business in the Lloyd's market involves the purchase of any "securities," and the Eleventh Circuit rightly refused to adopt a rule that would allow anyone willing to make a bare allegation of a federal securities law violation to disavow his "solemn promise" to litigate in a contractually chosen forum. Petitioners have given this Court no reason to review that decision.

D. The Views Expressed By The SEC As Amicus Curiae Below Are Entitled To No Deference And Add Nothing To Petitioners' Arguments

The Petitioners reveal a fundamental misunderstanding of the separation of powers and the authority of the Article III courts when they ask this Court to ignore its own ruling in Scherk and the unanimous rulings of the eight separate circuits on the enforceability of the Choice Clause and instead "affirm [sic] the SEC's interpretation." Pet. 14. "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). None of the special doctrines of statutory interpretation applicable in certain administrative law cases, such as the rule of Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), apply in this case.[9]

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Ninth Circuit has expressly held that the Rule 12(b)(6) presumption as to the truth of the complaint's allegations is inapplicable to a Rule 12(b)(3) motion to dismiss based on a contractual forum selection clause. Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 324 (9th Cir. 1996) (in ruling on "motions to dismiss based on a forum selection clause, the pleadings are not accepted as true").

[9] See Roosevelt v. E.I. du Pont de Nemours & Co., 958 F.2d 416, 427 n.19 (D.C. Cir. 1992) (R.B. Ginsburg, J.) (views on

Footnote continued

Petitioners also assert (Pet. 20 n.5) that the Second Circuit's holding enforcing the Choice Clause in Roby has somehow been called into question by the SEC's subsequent criticism of that decision. However, that argument has recently been expressly rejected by the Second Circuit itself. Stamm v. Barclays Bank, 153 F.3d 30, 33 (2d Cir. 1998) ("regardless of the position the SEC has now taken with regard to the Choice Clauses, such a change in position does not undermine our holding . . . . We therefore reaffirm our holding in Roby . . . ."). The SEC's views on the Choice Clause have also been fully considered and rejected by the Fourth, Fifth, and Ninth Circuits (in Allen, Haynsworth, and Richards II, respectively) as well as by the Eleventh Circuit. The courts of appeals have rejected the SEC's views on their merits, because they are contrary to this Court's holdings in Bremen and Scherk. They add nothing to Petitioners' arguments.

II. THE ELEVENTH CIRCUIT PROPERLY HELD THAT THE CHOICE CLAUSE COULD NOT BE AVOIDED BY THE TACTICAL PLOY OF ADDING NON-SIGNATORY SPOUSES WITH DERIVATIVE CLAIMS AS ADDITIONAL PLAINTIFFS

Petitioners argue that even if the Name Petitioners are bound by the Choice Clause, it was error to dismiss the Spouse Petitioners' claims because the spouses were not signatories to the

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statutory interpretation expressed by SEC in amicus brief in private litigation not entitled to Chevron deference). See also Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990) (no deference to agency views on scope of private right of action); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 746 n.10 (1975) (rejecting views of SEC as amicus in private action).

General Undertaking. Even though the lower courts held that the Spouse Petitioners' claims were "wholly derivative" of the Name Petitioners' claims, Petitioners seek to invoke First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995), and other cases related to agreements to arbitrate, to argue that "non-signatories to contracts are not bound by arbitration clauses in the contracts" (Pet. 28), and that therefore the Spouse Petitioners must be free to assert in federal district court their supposed claims against Lloyd's, all of which indisputably arise directly from the Name Petitioners' participation in the Lloyd's market pursuant to the General Undertaking.

This Court in First Options neither adopted nor endorsed a per se rule that non-signatories may never be bound by a forum selection or arbitration agreement, and nothing in that decision supports the argument that parties bound by a valid forum selection agreement may circumvent the agreement by having "closely related" non-signatories assert the very same claims.[10]

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[10] Lloyd's disputes that the Spouse Petitioners in fact have standing to pursue any claims against Lloyd's, but the Eleventh Circuit found it unnecessary to reach that issue in light of its decision enforcing the Choice Clause. Likewise, the lower courts found it unnecessary to reach the issue of forum non conveniens, which was fully briefed by Lloyd's as an alternative ground independently sufficient for complete dismissal of the case. In Haynsworth v. Lloyd's of London, 933 F. Supp. 1315, 1325 (S.D. Tex. 1996), aff'd sub nom. Haynsworth v. Corporation of Lloyd's, 121 F.3d 956 (5th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1513 (1998), a case involving alleged violations of the Texas securities code, one plaintiff had never signed the post-1986 version of the General Undertaking containing the Choice Clause, and the court dismissed that plaintiff's claims for forum non conveniens while dismissing the other plaintiffs' claims based on the Choice Clause. The same reasoning would compel dismissal of the Spouse Petitioners' claims here even if the Choice Clause itself were not applicable to them.

Indeed, this Court addressed only a limited threshold issue in First Options, one of absolutely no relevance to Petitioners' claims.

In First Options, the plaintiff had sought to arbitrate claims against both a corporation, which had executed an agreement containing an express arbitration clause, and two individuals, who had executed separate agreements with the plaintiff that did not contain any arbitration clause. 514 U.S. at 940-41. The individual defendants objected to confirmation of the arbitral award on the ground that they had never agreed to arbitrate. Id. at 941. As the Court noted, the parties in that case had two separate and distinct disputes related to arbitrability, both the question of (a) "whether they agreed to arbitrate the merits [of their dispute]"; and the question of (b) "who should have the primary power to decide [whether they agreed to arbitrate] . . . [and whether] that power belong[s] primarily to the arbitrators . . . or to the court." Id. at 942. This Court addressed only the latter question (id.), and held that, under the specific facts of the case, the parties had not agreed "to submit the arbitrability question itself to arbitration." Id. at 943 (emphasis supplied).

This Court thus affirmed the Third Circuit insofar as it had held that the federal courts, not the arbitrators, should determine whether or not the merits of the parties' dispute should be arbitrated. Id. at 949. However, while the Third Circuit had concluded that the merits were not arbitrable, this Court expressly declined to reach, or to express a view as to, the correctness of that decision, saying that "[t]his factbound issue is beyond the scope of the questions we agreed to review." 514 U.S. at 949.

The refusal of this Court to reach the question of arbitrability because of the "fact bound" nature of the issue belies Petitioners' assertion that First Options created a per se rule that a non-signatory party cannot be bound by a forum selection agreement executed by a closely related party. It was undisputed that the individual defendants in First Options had never personally executed any documents containing an arbitration clause. If that factor, standing alone, were dispositive, the

question would hardly have been "factbound" and unsuitable for resolution by this Court.[11] Thus, both this Court's and the Third Circuit's decisions in First Options are fully consistent with the common-sense proposition that parties to a valid and enforceable forum agreement cannot avoid their agreement by the simple expedient of adding a non-signatory plaintiff to the caption of a complaint.[12]

Petitioners' argument ignores well-established federal law holding that non-signatories are bound by forum selection clauses when they are so closely related to the dispute that it becomes

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[11] Moreover, the Third Circuit itself did not adopt such a per se rule. Rather than simply noting that the individual defendants had not personally signed documents containing an arbitration clause and holding that that was the end of the inquiry, the Third Circuit devotes no fewer than twelve pages of the Federal Reporter (19 F.3d at 1512-23) to a consideration of all the facts and circumstances relevant to arbitrability. Most significantly, the Third Circuit distinguished — rather than overruled — its own prior precedents expressly holding non-signatories to be bound by forum selection agreements noting that, in distinction to those cases, the plaintiff's claims against the non-signatory individual defendants had an independent basis from its claims against the signatory corporate defendant. Id. at 1515 ("in Pritzker, the non-signatories and the signatory's interests were co-extensive. That community of interest was material to our decision there.").

[12] Other cases Petitioners cite are likewise unhelpful to them for the same reason — under the specific facts of those cases the non-signatories were not bound by the forum agreements solely because the claims were independent of those asserted by the parties to the forum clauses. Dayhoff, Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1297 (3d Cir.), cert. denied, ___ U.S. ___, 117 S. Ct. 583 (1996); Packer v. TDI Sys., Inc., 959 F. Supp. 192, 198 (S.D.N.Y. 1997).

foreseeable that they will be bound. See, e.g., Manetti-Farrow, Inc. v. Gucci Am. Inc., 858 F.2d 509, 514 n.5 (9th Cir. 1988) ("[A] range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses"). This principle was well-recognized long before First Options (e.g., Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 203 (3d Cir.) (dismissing action based on forum selection clause requiring litigation in England although plaintiff was not itself a signatory of agreement containing clause), cert. denied, 464 U.S. 938 (1983); Stephens v. Entre Computer Ctrs., Inc., 696 F. Supp. 636 (N.D. Ga. 1988); Friedman v. World Transp., Inc., 636 F. Supp. 685, 691 (N.D. Ill. 1986) (plaintiff "cannot escape his . . . obligation under the forum clause simply because he happened to join additional parties who did not sign that contract")), and has continued to be recognized since First Options. See, e.g., International Private Satellite Partners, L.P. v. Lucky Cat Ltd., 975 F. Supp. 483 (W.D.N.Y. 1997); Graham Tech. Solutions, Inc. v. Thinking Pictures Inc., 949 F. Supp. 1427, 1434 (N.D. Cal. 1997) (transferring entire action to Southern District of New York based on enforcement of forum selection clause although two of the plaintiffs were not signatories of the document including the clause).

This case does not represent the first time a Name has employed this stratagem in an effort to evade the Choice Clause. In Hugel v. Corporation of Lloyd's, 999 F.2d 206 (7th Cir. 1993), a U.S.-resident Name, together with two affiliated corporations, sued Lloyd's for allegedly-wrongful disclosure of information that the Name and his corporations had produced to Lloyd's in response to a disciplinary investigation. The plaintiffs contended that the Choice Clause did not require the corporations to sue Lloyd's in England because the corporations were not members of Lloyd's, and had not signed the General Undertaking or any other document including a forum selection clause. Noting that the plaintiff Name had chosen to have the corporations provide information to Lloyd's, the Seventh Circuit accepted the district court's findings that the corporations "are so closely related to the dispute that they are equally bound to the [Choice

Clause]. . .," 999 F.2d at 210, and accordingly affirmed the dismissal of the action as to all three plaintiffs.

Similarly, the Name Petitioners here voluntarily chose to secure their letters of credit with property that was jointly owned by their spouses, and the Spouse Petitioners' claims against Lloyd's are entirely predicated on or derivative of those of the Name Petitioners. As the district court correctly found, the spouses co-signed irrevocable letters of credit in a knowing and considered effort to further their respective spouses' effort to become Names, and could "only receive a derivative benefit from their financial commitment." Pet. App. A-43.

The Spouse Petitioners do not make any claim of error in, or seek review of, the lower courts' factual determinations that they are closely related to the Name Petitioners and that their claims against Lloyd's are "wholly derivative" of those of the Name Petitioners. Instead, Petitioners argue for a rigid rule of law holding that a forum selection clause can never be enforced against any person except the actual signatory, regardless of any factual or equitable circumstances that would otherwise militate in favor of enforcement. This simply is not the law, and Petitioners have given no reason why it should be the law. To the contrary, the adoption of such a rule would simply encourage the "artful pleading" repeatedly rejected by the courts that have enforced the Choice Clause.

In sum, there is absolutely no inconsistency between the Eleventh Circuit's decision and this Court's decision in First Options, and therefore no reason for this Court to grant certiorari on this issue.

CONCLUSION

For all the foregoing reasons, this Court should deny the Petition for a writ of certiorari.

Dated: December 7, 1998

Respectfully submitted,

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APPENDIX

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GENERAL UNDERTAKING

This Undertaking is made the 10th day of November, 1986 between:

(1) The Society of Lloyd's incorporated by Lloyd's Act 1871 ("Lloyd's" (which expression shall include any officer or employee of Lloyd's, any person in or to whom whether individually or collectively any powers or functions are vested or delegated by or pursuant to Lloyd's Acts 1871-1982)) and

(2) IRMGARD ADELS LIPCON (the "Member") on behalf of himself and his legal and personal representatives and successors.

WHEREAS:–

(A) The Lloyd's Acts 1871-1982 conferred powers on the Council of Lloyd's (the "Council") to make byelaws for the purposes provided in such Acts.

(B) Pursuant thereto the Council duly made the Membership Byelaw (No. 9 of 1984) on 12th November, 1984 (the "Byelaw") prescribing inter alia requirements to be satisfied or complied with as a continuing condition of membership of, and of underwriting insurance business at, Lloyd's.

(C) The Member is or, as the case may be, is to become a member of Lloyd's.

(D) Pursuant to the provisions of the Byelaw and in consideration of the Member's admission to membership of, and/or of underwriting insurance business at, Lloyd's or, as the case may be, continuing membership of, and/or of underwriting insurance at, Lloyd's, the Member and Lloyd's consider that it is in their respective interests to become parties to this Undertaking.

NOW THEREFORE IT IS AGREED as follows:–

1. Throughout the period of his membership of Lloyd's the Member shall comply with the provisions of Lloyd's Acts 1871-1982, any subordinate legislation made or to be made thereunder and any direction given or provision or requirement made or imposed by the Council or any person(s) or body acting on its behalf pursuant to such legislative authority and shall become a party to, and perform and observe all the terms and provisions of, any agreements or other instruments as may be prescribed and notified to the Member or his underwriting agent by or under the authority of the Council.

2.1 The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.

2.2 Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and that accordingly any suit, action or proceeding (together in this Clause 2 referred to as "Proceedings") arising out of or relating to such matters shall be brought in such courts and, to this end, each party hereto irrevocably agrees to submit to the jurisdiction of the courts of England and irrevocably waives any objection which it may have now or hereafter to (a) any Proceedings being brought in any such court as is referred to in this Clause 2 and (b) any claim that any such Proceedings have been brought in an inconvenient forum and further irrevocably agrees that a judgment in any Proceedings brought in the English courts shall be

conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction.

2.3 The choice of law and jurisdiction referred to in this Clause 2 shall continue in full force and effect in respect of any dispute and/or controversy of whatsoever nature arising out of or relating to any of the matters referred to in this Undertaking notwithstanding that the Member ceases, for any reason, to be a Member of, or to underwrite insurance business at, Lloyd's.

3. If any term of this Undertaking shall to any extent be invalid or unenforceable, the remainder of the Undertaking shall not be affected thereby and each term of this Undertaking shall be valid and be enforceable to the fullest extent permitted by law and a substitute provision shall be negotiated by the parties hereto to preserve as nearly as possible the original intent of this Undertaking.

IN WITNESS whereby the parties hereto have cause this Undertaking to be duly executed on the date first written above.

SOCIETY OF LLOYD'S

By: [SIGNED]
Authorised Signatory [SEAL]

By: IRMGARD ADELS LIPCON
Member's Signature
[SIGNED]

Witnessed by: Charles R. Lipcon
One Biscayne Tower #2480
Miami, FL, 33131
U.S.A.

GENERAL UNDERTAKING

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1. Throughout the period of his membership of Lloyd's the Member shall comply with the provisions of Lloyd's Acts 1871-1982, any subordinate legislation made or to be made thereunder and any direction given or provision or requirement made or imposed by the Council or any person(s) or body acting on its behalf pursuant to such legislative authority and shall become a party to, and perform and observe all the terms and provisions of, any agreements or other instruments as may be prescribed and notified to the Member or his underwriting agent by or under the authority of the Council.

2.1 The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.

2.2 Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and that accordingly any suit, action or proceeding (together in this Clause 2 referred to as "Proceedings") arising out of or relating to such matters shall be brought in such courts and, to this end, each party hereto irrevocably agrees to submit to the jurisdiction of the courts of England and irrevocably waives any objection which it may have now or hereafter to (a) any Proceedings being brought in any such court as is referred to in this Clause 2 and (b) any claim that any such Proceedings have been brought in an inconvenient forum and further irrevocably agrees that a judgment in any Proceedings brought in the English courts shall be

conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction.

2.3 The choice of law and jurisdiction referred to in this Clause 2 shall continue in full force and effect in respect of any dispute and/or controversy of whatsoever nature arising out of or relating to any of the matters referred to in this Undertaking notwithstanding that the Member ceases, for any reason, to be a Member of, or to underwrite insurance business at, Lloyd's.

3. If any term of this Undertaking shall to any extent be invalid or unenforceable, the remainder of the Undertaking shall not be affected thereby and each term of this Undertaking shall be valid and be enforceable to the fullest extent permitted by law and a substitute provision shall be negotiated by the parties hereto to preserve as nearly as possible the original intent of this Undertaking.

IN WITNESS whereby the parties hereto have cause this Undertaking to be duly executed on the date first written above.

SOCIETY OF LLOYD'S

By: [SIGNED]
Authorised Signatory [SEAL]

By: MITCHELL JOHN LIPCON
Member's Signature
[SIGNED]

STATEMENT OF THE BRITISH GOVERNMENT, AMICUS CURIAE

Her Majesty's Treasury is submitting this amicus curiae statement on behalf of The Government of the United Kingdom and Great Britain and Northern Ireland (the "British Government"). The British Government is interested in this matter, because through the Treasury, it regulates the United Kingdom insurance and reinsurance industry. The British Government is concerned that allowing Names to litigate against Lloyd's in the United States, as appellants seek to do, undermines the regulatory regime approved by the UK Parliament.

Moreover, the British Government has reviewed the briefs submitted by both the appellants and the Securities and Exchange Commission seeking reversal of the district court's judgment requiring appellants to pursue their claims against Lloyd's in English courts pursuant to English law. The British Government is concerned that the briefs do not fully reflect the nature of Lloyd's or the availability in the English courts of adequate redress to members of Lloyd's.

To assist the Court, the British Government enters the following statement.

Locus

Her Majesty's Treasury is the Department of State which is responsible for the supervision of insurance in the United Kingdom—particularly the application of the Insurance Companies Act 1982[1]. Under that Act, subject to certain exceptions, no person may carry on insurance or reinsurance business in the United Kingdom unless authorised to do so. The Insurance Companies Act permits Names to conduct

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[1] The relevant functions previously exercised by the Secretary of State under the Insurance Companies Act 1982 were transferred to the Treasury on 5 January 1998 in accordance with the Transfer of Functions (Insurance) Order 1997, (SI 1997 no 2781).

insurance business as long as they become and remain subject to Lloyd's regulatory jurisdiction and provided the following conditions of the Insurance Companies Act are met:

> (a) insurance premiums are held within trust funds in accordance with the provisions of a trust deed approved by the Treasury—this protects insurance funds (required to meet liabilities to policyholders) from general use by members of Lloyd's and from general creditors in the event of the bankruptcy of a member;
>
> (b) an approved auditor certifies annually to the Treasury that each member has assets to meet his/her insurance liabilities;
>
> (c) the members of Lloyd's, taken together, satisfy the solvency requirements laid down by or under the European Union Directives and the 1982 Act.

The Treasury is responsible for ensuring that these conditions are satisfied.

While the Treasury has certain responsibilities under the Insurance Companies Act 1982, the operation of the Lloyd's market is regulated, in accordance with powers given under the Lloyd's Act 1982, by the Council of Lloyd's, as described more fully in the Factual Background section of the brief submitted to the Court by Lloyd's.

Nature of Lloyd's

The opening words of the SEC brief erroneously describe Lloyd's as "an English company," and wrongly suggest that Lloyd's issues insurance. The correct position is that Lloyd's, pursuant to the Lloyd's Act 1871-1982, has statutory powers granted by Parliament to regulate the affairs of the international insurance market in London in which each member of Lloyd's (ie Name) underwrites insurance business on his/her own account. For convenience, members of Lloyd's band together each year in syndicates to underwrite insurance during the year, but each member is liable only for his/her share

of any claims which arise on the insurance underwritten. The business of each syndicate is run by a managing agent, and the Names underwriting on a syndicate appoint the managing agent to act on their behalf. The statutory solvency tests, described in sub-paragraphs (b) and (c) above, namely that each member must have assets to meet his/her liabilities, and that the members together must meet the European Union solvency requirements, reflect the fact that it is the members, and not Lloyd's as a whole, who carry on the business of insurance.

The Names' argument appears to be based on the erroneous view that Lloyd's is simply a business corporation; and accordingly that the choice clauses contained in the general undertakings given by the plaintiffs are analogous to those contained in normal international commercial transactions. However, as noted above, the business of insurance at Lloyd's is carried on by the members (Names) and not by Lloyd's. Lloyd's (to which the undertaking is given), is a distinct legal entity separate from the Names with regulatory functions, exercisable through the Council, which are conferred on it by the Lloyd's Acts 1871-1982. Those functions include in particular the establishment of byelaws, rules and regulations intended for the protection of Names' policyholders and are exercised in accordance with conditions imposed by and pursuant to the Insurance Companies Act 1982, which provides the framework for supervising all insurance companies in the United Kingdom. It is precisely the operation of this regime which justifies the exemption of Names from direct regulation as insurers by the Treasury (and is granted only so long as they remain members of Lloyd's and meet the specified statutory conditions). It also explains why the special position of Lloyd's (and in particular the ability of individual Names to write business in the Lloyd's market) is recognised under the European Union Insurance Directives, which require every member State to ensure that its authorities have the necessary powers to supervise insurance undertakings with head offices in its territory. The most important of the regulatory functions

contemplated by these Acts is the prudential one of ensuring that sufficient insurance funds are, and will be, available to meet policyholders' claims as and when they arise, and detailed arrangements governing the creation and protection of such funds are laid down by and pursuant to this legislation. It would be detrimental to this regulatory regime approved by Parliament if insurers, whether at Lloyd's or elsewhere, could frustrate the operation of those arrangements by invoking the assistance of courts of other jurisdictions in direct contravention of the choice clause contained in the General Undertaking.

Availability of remedies in English Courts

The observations of the Securities and Exchange Commission refer to the immunities from suit afforded to Lloyd's under section 14 of the Lloyd's Act 1982. It should however be noted that those immunities were given to ensure that Lloyd's will not be deterred from exercising its regulatory powers by threats of action from those who might thereby be adversely affected. Comparable immunities are conferred upon other regulators in the United Kingdom, either expressly by statute or (as in the case of the Treasury) by virtue of judgments of the courts. Those immunities are confined to proceedings against Lloyd's and even then do not extend to allegations of fraud, such as are being advanced by the plaintiffs in these proceedings. The British Government does not accept the suggestion that, apart from the area of immunity, the appellants would find difficulty in pursuing those or other allegations in the English courts. All plaintiffs would receive fair, unbiased and speedy justice in English courts. Indeed it should be noted that a number of Names brought actions for negligence against certain managing agents, and the judgments in those cases helped shape the settlement offer which was accepted by over 94% of the Names in the Autumn of 1996.

Dated this 27th day of February 1998

/s/ PETER J. CASEY
Peter J. Casey
for and on behalf of Her Majesty's Treasury